U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: 09/27/99
Case No.: **1999 INA 200**

In the Matter of:

EL PUEBLO BAKERY, INC., Employer,

on behalf of

PEDRO CORONA-TEJEDA, Alien

Appearance: R. J. Gleckman, Esq., of Los Angeles, California, for Employer and Alien
Certifying Officer: R. M. Day, Region IX.

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application filed on behalf of PEDRO CORONA-TEJEDA ("Alien") by -EL PUEBLO BAKERY, INC., ("Employer") under§ 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On January 30, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Baker/Mexican Style" in its Mexican Style Bakery.[2] See AF 54. Employer described the Job to be Performed as follows:

> Prepare & bake breads, sweetbreads, rolls, muffins, pastries & cakes according to Mexican recipes and knowledge of Mexican style baking. Measure ingredients, such as flour, margerine yeast, butter, eggs, milk, etc. and mix them to form dough or batter using electric mixer or by hand. Shape or form dough for pastries, sweetbreads, rolls, or cakes using cutter, roller or by hand. Place formed dough or batter in greased pans, or cookie sheets, spread or sprinkle with toppings, such as jelly, cinnamon, poppy seeds, coconut flakes, etc. Place pans in oven.

AF 54, box 13. (Copied verbatim without change or correction.) The Job Offered was classified as "Baker" under DOT Occupational Code No. 526.381-010.[3] The Application stated no educational requirements, but it required two years of experience in the Job Offered. The "Other Special Requirement" was "Must be familiar with all types of Mexican style pastries, rolls, and sweetbread." The hourly wage rate offered was $7.42, plus overtime at an hourly rate equal to time and a half. The workday hours were from 11:00 A.M. to 7:30 P.M. on days that were not specified. *Id.*, boxes 10-12, 14, 15.

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[2] A National of Mexico, the Alien was born 1965. At the time of application the Alien was living and working in the United States without a visa or any other lawful permission under the Act. He did not indicate that he had any education whatsoever. He said he had worked in a bakery in Mexico from 1985 to 1987. After an employment hiatus of three months, he became a cook in a restaurant in the State of Washington in 1992, where he was working as a cook at the time this application was filed. AF 59-60.

[3] 526.381-010 **BAKER** (bakery products) Mixes and bakes ingredients according to recipes to produce breads, pastries, and other baked goods: Measures flour, sugar, shortening, and other ingredients to prepare batters, dough, fillings, and icings, using scale and graduated containers [DOUGH MIXER (bakery products) 520.685-234]. Dumps ingredients into mixing-machine bowl or steam kettle to mix or cook ingredients according to specifications. Rolls, cuts, and shapes dough to form sweet rolls, piecrust, tarts, cookies, and related products preparatory to baking. Places dough in pans, molds, or on sheets and bakes in oven or on grill. Observes color of products being baked and turns thermostat or other controls to adjust oven temperature. Applies glaze, icing, or other topping to baked goods, using spatula or brush. May specialize in baking one type of product, such as breads, rolls, pies, or cakes. May decorate cakes [CAKE DECORATOR (bakery products) 524.381-010]. May develop new recipes or cakes and icings. GOE: 06.02.15 STRENGTH: H GED: R3 M2 L2 SVP: 7 DLU: 80.

Notice of Findings.[4] Subject to rebuttal, the CO denied certification on May 22, 1997, concluding that the Employer failed to document the existence of a job that was truly open to U. S. workers, citing 20 CFR §§ 656.3 and 656.20(c)(8).[5] (1) The NOF discussed the number of the Employer's applications for alien labor certification in the context of the operation of its bakery business. The NOF noted *inter alia* that in the period between 1992 and the date of application the total number of her alien labor certification applications greatly exceeded the total number of employees to whom the Employer was paying wages. (2) The NOF then noted the disparity in Employer's wage payments to its employees generally, explaining that "only one employee is being paid reported wages that compare to the amount that is being offered each time that the company submits an application for alien labor certification. That worker is not among the beneficiaries of the labor certification applications, and no other worker earns a salary that even approaches the offered salary for the labor certification application." AF 33.[6] Employer's actual payroll indicated that its workers were paid wages in irregular amounts, that some of them did not appear to have full-time hours, that the majority of them earned from $2,000 to $2,200 per quarter, and that the average salary was below $800 per month. Upon comparing the Employer's current payroll with the records of the many alien labor certification applications previously granted in response to its applications, the NOF reported that few of the names of previous alien beneficiaries of such applications were still working for the Employer.

Because at least eleven more applications by the Employer for the certification of alien laborers were currently pending before the Department of Labor ("DOL") in this regional office, the NOF reached the inference that .

> Thus there is a steady stream of applications for alien labor certification being submitted which, since 1992, have not resulted in employment of at least most of the alien beneficiaries, and [that] those employees that the petitioner does have are not being paid the prevailing wage that the employer continues to offer when it submit[s] more applications for alien labor certification.

AF 34. (Emphasis as in the original.) The NOF continued, "Based upon this pattern, it does not appear that the Department of Labor can find that there is a job that is truly open to U. S. workers as required by the regulations at 20 CFR 656.20(c)(8)." *Id.* By way of rebuttal the NOF

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[4] **20 CFR § 656.25(c)** If a labor certification is not granted, the Certifying Officer shall issue to the employer, with a copy to the alien, a *Notice of Findings,* as defined in §656.50. The *Notice of Findings* shall: (1) Contain the date on which the *Notice of Findings* was issued; (2) State the specific bases on which the decision to issue the *Notice of Findings* was made; (3) Specify a date, 35 calendar days from the date of the *Notice of Findings,* by which documentary evidence and/or written argument may be submitted to cure the defects or to otherwise rebut the bases of the determination, and advise that if the rebuttal evidence and/ or argument have not been mailed by certified mail by the date specified.

[5] 20 CFR § 656.3 Definitions, for purposes of this part, of terms used in this part. ... *Employment* means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.

20 CFR § 656.20 General filing instructions. ... (c) Job offers filed on behalf of aliens on the *Application for Alien Employment Certification* form must clearly show that: (8) The job opportunity has been and is clearly open to any qualified U.S. worker.

[6] The NOF calculated that the hourly wage rate offered in this application, $7.42, amounts to $268.80 per week, $1,072 per month, $3,216 per quarter. Annualized, the wage offer contemplated a payment equal to $12,864 per year.

directed Employer to explain in detail how the total number of applications for alien labor certification it submitted in the past several years was more than double the total number of actual employees it reported as currently employed in its bakery, and to explain why it had not employed the beneficiaries whose names were now missing from its records. The NOF further directed Employer to identify the employees named on its current quarterly payroll report to the State of California who were beneficiaries of her alien labor certification applications, and to explain why the Employer was not paying her current employees at the same prevailing hourly rate that it offered each time a new alien labor certification application was submitted. The NOF concluded,

> Absent a persuasive rebuttal, the Department will not be able to find that the described position for a full-time baker earning $7.42 per hour exists or that the job is truly open to U. S. workers.

Id.

Rebuttal. On May 28, 1997, Employer's counsel filed a rebuttal that consisted of documents excerpted from this record, a written statement by the Employer's owner, and Federal and State tax return and other documents. Noting that the Employer's business consisted of two bakeries operating a total of six shifts per day, Employer's argument stated that its need for full-time bakers did exist. It argued that her labor certification applications were justified by the existence of the two bakeries, adding that it needed six shifts of five bakers each or a total of thirty "new bakers" to be employed in their operation. Apparently referring to the tax return schedules and other documents filed in the rebuttal as its financial evidence, the Employer said its business could afford to pay the salaries offered in this and the other alien labor applications. AF 30-31.

Final Determination. In the Final Determination, dated August 15, 1997, the CO denied certification, explaining that the Employer's rebuttal did not refute of the NOF findings and that the Job Offered was not truly open to any qualified U. S. worker within the meaning of 20 CFR § 656.20. AF 05-06. The CO explained that although the rebuttal emphasized Employer's ability to pay the offered salary, her payroll records indicated that it was paying all of its bakery employees wages at a level that was far below the hourly rate she offered in this application. Addressing the NOF requirements, the Final Determination said,

> It had been put forth in the Notice of Findings that a review of the employer's quarterly payroll report to California showed that most of the names of the employees did not match the names of the beneficiaries of the previously approved alien labor certification beneficiaries of previously approved alien labor certification applications. Since at least fifty applications for permanent alien labor certification have been approved for this employer since 1992, the employer was requested to document which employees on its payroll were the beneficiaries of the approved labor certification applications and to explain why none received the prevailing wage, even though the prevailing wage had been offered on each application, over and over again.

The CO rejected the Employer's rebuttal contention that it had not employed beneficiaries of her alien labor certification applications because the applications those aliens filed to request permission to work were still pending, because its allegations were unsupported by the evidence of record. Finally, the CO said,

> The employer's assertion that the job is being offered at the prevailing rate of pay, $7.42 per hour, is not convincing where there is an extensive history of paying less and not one worker has ever been paid a reported wage that compares to the prevailing rate for full-time work. Based upon this history, the employer in rebuttal has failed to overcome the finding that there is no job for a U. S. worker as described on the application. Therefore the application is denied.

AF 06.

Appeal. On September 19, 1997, the Employer appealed. Reciting its compliance with the posting and advertising requirements of the regulations, the Employer contended that it had demonstrated that the Job Offered was open to U. S. workers under 20 CFR § 656.20(c)(8). The Employer disagreed with the conclusions of law and fact stated by the CO and argued that the average hourly wage it paid its employees in the third quarter statement of 1996 was $8.37, which supported the Employer's rebuttal statement.

Discussion

Issue. The issue referred is whether the Employer sustained its burden of proving the existence of a *bona fide* job opportunity that was open to U. S. workers[7].

Burden of proof. This allocation of the burden of proof arises from the circumstance that labor certification is an exception to the general operation of the Act, in which Congress has provided favored treatment for a limited class of alien workers whose skills were needed in the U. S. labor market. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). 20 CFR § 656.2(b) quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on applicants for alien labor certification.[8] **Gerata Systems America, Inc.**, 88 INA 344 (Dec. 16, 1988). Moreover, the Panel is required to construe this exception strictly, and to resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

***Bona fide* job opportunity**. The U. S. District Court in the Central District of California discussed the meaning of a *bona fide* job opportunity in **Pasadena Typewriter and Adding Machine Co., Inc., and Alirez Rahmaty v. United States Department of Labor** , No CV 83-5516-AABT, (C.D. Dal., 1987), explaining that

> The regulations require a "job opportunity" to be "clearly open." Requiring the job

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[7] See generally **Amger Corp.**, 87 INA 545 (Oct. 15, 1987)(*en banc*).

[8] "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

> opportunity to be *bona fide* adds no substance to the regulations but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of § 656.20(c)(8). Likewise, requiring that the job opportunity be *bona fide* clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of § 656.50.[9]

See *id*., at p. 7, *slip op*. The Board later discussed the burden of proof in **Amger Corp.**, 87 INA 545 (Oct. 15, 1987)(*en banc*)., explaining that the Employer must present clear evidence that a valid employment relationship exists, that a *bona fide* job opportunity is available to domestic workers, and that the employer has sought in good faith to fill that position with a U. S. worker.[10]

Employer's evidence. (1) The CO questioned the *bona fides* of the Job Offered after a review of the state employment and tax records indicated that over a long period of time that the Employer had not in fact hired a large proportion of the aliens to whom DOL had previously granted the alien labor certification at the request of the Employer for this bakery. (2) The CO further observed that Employer's payroll records did not indicate that it was, in fact, paying the prevailing hourly wage rate to its current workers in the same position. **Bob's Chevron**, 93 INA 498 (May 31, 1994). The Employer rebutted with a statement that some of the workers whose certification DOL had previously granted had not yet received permission to work. After examining the rebuttal, the Panel finds that the Employer did not identify any of the workers to whom its rebuttal argument referred. The Employer further asserted that the average hourly wage it paid in one quarter indicated an hourly rate that exceeded the prevailing wage level. The rebuttal further indicates that the Employer did not identify any worker to whom it had paid wages at or above the prevailing rate, however.

Analysis and conclusion. Unless the form of the evidence is specified by the regulations or by the NOF, "written assertions which are reasonably specific and indicate their sources or basis shall be considered documentation." **Gencorp**, 87 INA 659 (Jan. 13, 1988)(*en banc*). In this case, the Employer's rebuttal presented bare assertions of fact without supporting reasoning or evidence, which were insufficient to carry its burden of proof. **Alfa Travel**, 95 INA 163 (Mar. 4, 1997). Where an employer's rebuttal fails to offer evidence challenging the NOF findings, the response is inadequate under 20 CFR §656.25(c)(3).[11] (1) This Employer did not comply with the NOF request for documentation to explain in detail how the total number of applications for alien labor certification that it had submitted in the past was more than double the total number of actual employees it reported as currently employed in its bakery. Moreover, the Employer failed to explain was not employing the beneficiaries whose names were missing from its records. In addition, the NOF directed the Employer to identify which of the employees it named on its current quarterly payroll report to the State of California were beneficiaries of its previous alien labor certification applications. (2) The Employer's rebuttal did not provide a

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[9] 20 CFR § 656.50 was later recodified as 20 CFR § 656.3.

[10] Also see **State of California Dept. of Consumer Affairs**, 94 INA 396 (Jul 18, 1995).

[11] For example, the denial of certification was affirmed where the employer did no more than cite to data already in the record. **Ted Tokio Tanaka Architect,** 88 INA 334 (June 27, 1989).

persuasive explanation for its failure to pay its current bakery employees at the same prevailing hourly rate that it had offered each time it submitted a new alien labor certification application. [12]

It is well established that a bare assertion without supporting reasoning or evidence generally is insufficient to carry an employer's burden of proof. **Interworld Immigration Service**, 88 INA 490(Sep. 1, 1989), citing **Tri-P's Corp.**, 88 INA 686(Feb 17, 1989). Consequently, although its rebuttal duly addressed the NOF requests, its explanation was unsupported by corroborating evidence and consequently could not establish that a *bona fide* job opportunity for which U. S. workers can be referred actually existed in Employer's bakery under the totality of circumstances test of 20 CFR § 656.20(c)(8). **Carlos Uy, III**, 1997 INA 304 (Mar. 3, 1999)(*en banc*). Moreover, in addressing the CO's request for information necessary to determine the employer's ability to offer permanent, full-time work under **Carlos Uy, III**, the Employer's rebuttal admitted that its bakery business had suffered a loss in ordinary income from business activities during 1995. With this concession the Employer's rebuttal admitted that its capacity to hire and pay the prevailing wage rate to the Alien as a baker was open to question. AF 46, line 21.

Summary. The Panel finds that the evidence supports the CO's conclusion that the Employer failed to demonstrate the existence of a job for a baker, as it failed to show that its bakery actually had a specific opening for which it could pay the prevailing wage, despite the representations of its Application. Consequently, the Employer did not sustain its burden of proving that a it was offering a position of full-time employment to which U. S. workers could be referred under 20 CFR § 656.20(c)(8). The Panel concludes that the NOF provided sufficient notice of the reasons for denial of certification, and that Employer was told how to cure the defects found in the application. As Employer failed to sustain its burden of proof, the evidence supports the CO's denial of labor certification under the Act and regulations.

Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification is affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

[12] Such evidence was necessary to a finding that her business was actually offering a position for a full-time baker at the hourly wage rate of $7.42 that was truly open to U. S. workers.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.